WP(C) 2262/2007
BEFORE
HON'BLE JUSTICE B.K. SHARMA

JUDGEMENT AND ORDER

1. While in the first writ petition, the petitioner has challenged the action on the part of the jurisdictional Inspector of schools towards handing over charge of the post of Principal of the particular school to the private respondent, the private respondent has filed the second writ petition questioning the legality of the order passed by the Director of Secondary Education, Assam holding that the petitioner in the first writ petition is the seniormost Assistant Teacher of the school and consequently entitled to hold the charge of the Principal. It will be pertinent to mention here that by the order so passed by the Director of Secondary Education, Assam he has determined the seniority between one Shri Bipin Chandra Sarma, another Assistant Teacher of the school vis a vis the petitioner in the first writ petition. In the order, the petitioner in the second writ petition does not figure, but she is aggrieved by the finding recorded in the order holding that the petitioner in the first writ petition is the senior most Assistant Teacher of the school. Be it further stated here that said Shri Bipin Chandra Sarma being aggrieved by the said order, had approached this Court by filing the writ petition being W.P. No. 8978/03. In the writ petition an interim order was passed on 23.12.05 by virtue of which said Shri Sarma continued to be the Principal-in-Charge of the school. The writ petition has been disposed of, being infructuous, in view of the fact that said Sarma retired from service on attaining the age of superannuation. However, the legality and validity of the order passed by the Director is required to be decided in view of the challenge put by the petitioner in the second writ petition.

2. Since the petitioners in both the writ petitions are with rival claims of seniority over each other and consequently holding the charge of Principal of the school, they have been heard together and are being disposed of by this common judgment and order.

3. The facts are very in a narrow campus. As far as the respective date of appointment as the Assistant Teacher in the Graduate scale of pay is concerned, admittedly the first writ petitioner is senior to the second writ petitioner. The writ first petitioner was first appointed on 17.12.73 as Science Graduate teacher under a programme called Half a Million Job. He received Graduate scale of pay w.e.f. 01.02.75. On the other hand, the second writ petitioner was appointed as Science Graduate teacher w.e.f. 16.11.76. However, it is the case of the second writ petitioner that, as per rule 24 of Assam Secondary Education (Provincialisation) Services Rules 2003, the petitioner in the first writ petition being appointed under Half a Million Job Programme would get seniority w.e.f. 01.03.78. If that be so, the petitioner in the second writ petition having been appointed on 16.11.76, would rank senior to the first writ petitioner. It will be pertinent to mention here that while entertaining the second writ petition, this Court by order dated 17.02.06 issued direction to the Director of Secondary Education, Assam who had earlier determined the seniority between the first writ petitioner and aforesaid Shri Bipin Chandra Sarma, to dispose of the representation of the second writ petitioner raising the seniority dispute.

4. Pursuant to the said order, the Director of Secondary Education, Assam by his order dated 21.09.06 has determined the seniority between the two writ petitioners holding that it is the first writ petitioner who is senior to the second writ petitioner. This order dated 21.09.06 has been put to challenge by the second writ petitioner by way of Misc. case being Misc. case No. 784/07.

5. I have heard Mr. B.C. Das, learned counsel representing the first writ p

etitioner as well as Mr. A.S. Choudhury, learned Sr. counsel representing the second writ petitioner. I have also heard Mr. S.K. Das, learned S.C., Education Department who has produced the records and I have gone through the same.

6. As noticed above, there is no dispute that as per the respective date of joining the school as Graduate Teacher, the first writ petitioner is senior to the second writ petitioner. But in view of Rule 24 of the aforesaid Rules of 2003, it is the claim of the second writ petitioner that she would rank senior to the first writ petitioner as his seniority will have to be counted w.e.f. 01.03.78. Rule 24 (iii) of the Rules of 2003 reads as follow:

(iii) regarding seniority in respect of H.M., J.P. (Stipendiary) teacher, seniority shall be counted from the date of regularization in Graduate cadre with effect from 01.03.78 vide Govt. letter No. ESS/0/72/468 dated 10.01.78.

7. The aforesaid Rules of 2003 came into being w.e.f. 12.08.03 on its publication in the Assam Gazette (Extraordinary). None of the provisions of the rules is operative retrospectively. On the other hand, both the writ petitioners were appointed way back in 1973 and 1976 before coming into force, the Assam Secondary Education (Provincialisation Act, 1977. The Rules framed thereunder is the Assam Secondary Education (Provincialised) Service Rules, 1982. As per Rule 13 of the Rules, the interse seniority of the existing employees in the respective cadre shall be determined in relating to:

a) date of continuous appointment
b) date of joining
c) date of birth.

8. By operation of this rule, both by virtue of the date of continuous appointment and the date of joining, the first writ petitioner would rank senior to the second writ petitioner. As against the plea that the seniority of the first writ petitioner will have to be counted from 01.03.78, the issue is no longer res intrega. The Division Bench of this Court by its judgment and order dated 22.07.02 delivered in Writ Appeal No. 98/02 (Shri Arun Ch. Neog vs. State of Assam and others), has held that the seniority would be counted from the date of receiving the Graduate scale. In that case, upon discussion of the scheme relating to Half a Million Job programme, it has been held that although the respondent was regularized in his service in the Graduate scale of pay from 01.03.78, but for the purpose of seniority, his service would be counted from 01.01.75 as he was absorbed in the Graduate cadre w.e.f. 01.01.75. The operative part of the judgment is quoted below:

3. It reveals from the record that on 14.01.75 the Government of Assam conveyed sanction of the Governor of Assam to creation of 1000 posts of graduate teachers in the scale of pay of Rs. 335-15-400-EB-16-500-EB-18-650/- plus other allowances as admissible under the Rules with effect from 01.01.75 to 20.02.75 for absorption of the 1000 Graduate Stipendiary Teachers under the Half-a-Million Job Programme and accordingly the Respondent's service has been absorbed in the Graduate cadre from 01.01.75 which later on was regularized on 01.03.78. It is apparent that the respondent was absorbed as Teacher in the Graduate scale from 01.01.75 whereas the petitioner was given Graduate scale from 01.03.77. Although the respondent was regularized on the Graduate Scale of pay from 01.03.78, for the purpose of seniority Gradaute scale of pay, his services shall be counted from 01.01.75. The petitioner/appellant being allowed the graduate scale of pay from 01.03.77, is apparently junior to the respondent No. 5 who has been assigned graduate scale from 01.01.75. The rule 13 of the Assam Secondary Education (Provincialised) Service Rules, 1982 governing the service of the petitioner and the Respondent No. 5, speaks of the inter se seniority of the existing employees in the respective cadre according to which determination of the inter se seniority in the cadre shall be made on the basis of date of continuous appointment, date of jo

ining or date of birth. The ate of continuous appointment in graduate cadre of t he Respondent No. 5 is from 01.01.75 whereas for the petitioner it would be from 01.03.77. Entry in the cadre of the respondent No. 5will relate back to the dat e he entered the cadre, on regularization of his services in graduate cadre, i.e . from 01.01.75. Rules governing the service conditions of the employee shall ha ve overriding effect over the circulars and orders issued by the State, and shal l be given effect. The respondent being senior in the graduate cadre has to be a ssigned seniority over the petitioner/appellant, that is what has been directed by the learned Single Judge and we do not find any illegality or infirmity in th e order impugned.

9. Apart from the fact that the rules of 2003 is only prospective, and ca nnot take away the seniority of the first writ petitioner who he has already ear ned, the Rules of 2003 itself provides that while rules corresponding to the Rul es of 2003 would stand repealed, all other action in the rules so repealed or u nder any general orders ancillary thereto shall be deemed to have been validly m ade or taken under the corresponding provision of the said rules. In this connec tion Rule 32 of the Rules of 2003 may be referred to.

10. Mr. A.S. Choudhury, learned Sr. counsel representing the second writ pet itioner has placed reliance on the decision of the Apex Court, reported in (2006) 6 SCC 558 (K. Modalaimuthu vs. State of Tamil Nadu) emphasizing that temporar y service rendered by an incumbent will not be counted towards seniority. Accord ing to him since the petitioner in the first writ petition was appointed under t he particular scheme, the service rendered by him under the scheme will not be counted till his service was regularized.

11. Above argument of Mr. Choudhury, will rather damage the case of the seco nd writ petitioner. As per the materials available on record and also as reflect ed in the impugned order dated 21.09.06 (Annexure-2 to the Misc. case No. 784/07), the second writ petitioner was first appointed by the Headmaster of the schoo l on 11.11.76 only for a period of three months. Her such appointment was approv ed by the jurisdictional Inspector of Schools on 18.11.76. Her service has been regularized by the Inspector of schools by his order dated 11.11.05. If that be so and if the argument advanced by Mr. Choudhury is accepted, then the second wr it petitioner can count her seniority only from 11.11.05. However, Mr. Choudhury has submitted that such order on the part of the Inspector of schools was uncal led for and cannot take away with the seniority of the petitioner from her initi al date of appointment, i.e. 16.11.76.

12. Annexure-1 to the first writ petition is the proforma relating to senior ity in respect of which none of the parties has raised any dispute. In the rema rk column of the document, it has been mentioned that there is no record to sh ow that the initial appointment of the second writ petitioner which was only for three months was further extended. However, her service was confirmed by order dated 16.04.93.

13. Even if the seniority of the second writ petitioner is counted from 16.1 1.76, then also she will not rank senior to the first writ petitioner who was fi rst appointed on 17.12.73 as Science Graduate teacher under Half a Million Job P rogramme. He received Graduate scale of pay w.e.f. 01.02.75. If that be so, as p er the aforesaid decision of the Division Bench of this Court, his seniority wil l be counted w.e.f. 01.02.75. Even otherwise also by operation of Rule 13 of the Rules 1982 and taking into account his continuous service w.e.f. 17.12.73 he wo uld rank senior to the second writ petitioner.

14. Under somewhat similar circumstances this court in the decision reported in 2004 (Suppl.) GLT 808 (Satya Saran Biswas vs. State of Assam and others) has held that the teachers appointed under Half a Million Job Programme would get s

eniority from the date of appointment and not w.e.f. 01.03.78 as was indicated in the Govt. letter dated 10.01.78 which has been mentioned in Rule 24(iii) of t he aforesaid rules of 2003. Even otherwise also the provision of the Act, 1977 a nd the Rules 1982 framed therein cannot be set at naught by issuing the letter d ated 10.01.78. Paragraphs-15 and 17 of the aforesaid judgment in Satya Saran Bis was (supra) are quoted below:

15. Even if the aforesaid Rule of 2003, more particularly Rule 24(2)(ii) with w hich the present proceeding is concerned is stated to be in force, such a provis ion conferring seniority to the Graduate Teachers appointed under Half a Million Job Programme w.e.f. 01.03.78 is not applicable to the case in hand on two coun ts viz. (1) the petitioner was appointed under the said programme in the Graduat e scale of pay w.e.f. 01.01.75. Thus the date 01.03.78 stipulated in Rule 24(2)(iii) of the aforesaid Rules of 2003 is not applicable to the petitioner. Second ly, the Division Bench of this Court in the aforesaid Writ Appeal No. 98/02 has clearly held that the date of regularization in the Graduate cadre i.e. 01.01.75 pertaining to the Graduate teachers appointed under Half a Million Programme wo uld be the decisive factor towards counting of seniority. In that case the Divis ion Bench held that the respondent who was also appointed under Half a Million P rogramme would get his seniority from the date of his continuous appointment in the Graduate Cadre i.e. from 01.01.75 with effect from which date his service wa s regularized. The Division Bench decided the issue by its judgment and order da ted 22.07.2002. At that time the provision as contained in Rule 24(2)(iii) of th e aforesaid Rules of 2003 were incorporated in the Govt. Notification dated 22.0 1.2001 providing counting of seniority in respect of teacher appointed under Hal f a Million Job Programme with effect from the date of regularization of service in the Graduate Cadre w.e.f. 01.03.78 vide Govt. letter No. ESS 70/72/468 dated 10.01.78. The said decision did not find favour with the Division Bench inasmuc h as the services of the respondent in the Writ Appeal who was also appointed un der Half a Million Job Programme like that of the writ petitioner was regularize d in his service w.e.f. 01.01.75. If there are any other teachers in the Graduat e Cadre appointed under Half a Million Job Programme whose services were regular ized w.e.f. 01.03.78, their seniority may be counted on the basis of the aforesa id Notification and the provision of the Rule 24(2)(iii) but certainly not in th e case of the writ petitioner. Otherwise the law laid down by the Division Bench of this Court could not have been set at naught by incorporating the same very Notification under Rule 22(2)(ii) of the aforesaid Rules of 2003.

17. In the impugned order dated 23.12.2003, the Director of Secondary Educat ion, Assam while admitting that as per the departmental rules and criteria of se niority towards promotion to the next higher post, same is counted from the date of receiving the Graduate scale of pay and that the petitioner received the sam e at an earlier point of time than the respondent No. 4, suddenly came to the co nclusion that his seniority for promotion to the next higher post would count w. e.f. 01.03.78 without assigning any reason. It was argued on behalf the responde nt No. 4 that such assignment of seniority to the writ petitioner is on the basi s of the aforesaid Notification providing counting of senerioty of the Graduate teachers appointed under Half a Million Job Programme. The position has already been discussed above, in reference to the date of regularization of the services of the petitioner w.e.f. 01.01.75 and the aforesaid decision of the Division B ench. In such a situation the seniority of the writ petitioner cannot be arbitra rily counted w.e.f. 01.03.78.

15. In the instant case, the seniority of the petitioner vis a vis said Shri Bipin Chandra Sarma was first determined by order dated 21.12.05 (Annexure-4 to the first writ petition) holding that the petitioner’s seniority would be count ed w.e.f. 01.02.75, i.e. the date of receiving Graduate scale of pay. Thereafter in terms of the order in the second writ petition, the seniority between the tw o petitioners has also been decided by the Director of Secondary Education, Ass am holding that the first writ petitioner is senior to the second writ petitione

r. In such a situation, with the retirement of Mr. Bipin Chandra Sarma w.e.f. 30 .04.07 on attaining the age of superannuation, as per the said two orders passed by the Director of Secondary Education, the Inspector or schools ought to have allowed the first writ petitioner to hold the charge of the post of Principal, b ut instead he allowed the second writ petitioner to do so. This is in clear viol ation of the orders passed by the higher authorities as well as the seniority po sition between the two writ petitioners.

16. If the second writ petitioner can claim seniority from her initial date of appointment, i.e. from 16.11.76 irrespective of the fact that she was initial ly appointed only for three months and thereafter her service was not extended, there cannot be any reason as to why seniority of the first writ petitioner cann ot be counted from his initial date of appointment. In Nripen Kalita vs. State of Assam and others reported in 1988 2 GLR 17 referring to the provisions of the aforesaid Act, 1977 and the Assam Secondary Education (Provincialisation) (Serv ice and Conduct) Rules, 1979, the Division Bench of this Court while repelling t he contention that seniority shall be counted from the date of provincialisat ion of the school, which in that case was w.e.f. 01.10.77, held that earlier per iod of service rendered cannot be obliterated. If that be so, the petitioner in the first writ petition having been appointed prior in time, i.e. w.e.f. 17.12.7 3 as science Graduate teacher, he will definitely rank senior to the petitioner in the second writ petition who was appointed w.e.f. 16.11.76. This is also the mandate of Rule 13 of the Rules of 1982 which was in the field till the same was repealed by 2003 Rules.

17. There is another aspect of the matter. The petitioner in the first writ petition has been functioning as Vice Principal of the school w.e.f. 01.01.2000. If that be so, in the normal circumstances, in case of vacancy in the next hig her post, i.e. the Principal, he will have better claim for the same than anyon e else inasmuch as if any one else was senior to him, the petitioner could not a nd would not have been allowed to function as the Vice-Principal of the school.

18. By the impugned communication dated 30.04.07 (Annexure-6 to the first w rit petition) the Inspector of schools simply asked the outgoing Principal-in-Ch arge of the school, i.e. Shri Bipin Chandra Sarma to hand over the charge to the petitioner in the second writ petition. Such a course of action perhaps has be en adopted in view of ongoing litigation. This is precisely the reason as to why in the said communication the petitioner in the second writ petition, has no t been described as the seniormost teacher of the school. However, the Inspector of schools could not have done so in view of the fact that the seniority of the first writ petitioner over others including the second writ petitioner stood al ready determined by the higher authority, i.e. the Director of Secondary Educati on.

19. For the forgoing reasons, discussions and conclusions, I have no hesitat ion to hold that the first writ petitioner is senior to the second writ petition er and consequently there is nothing wrong in the impugned orders dated 21.09.06 (Annexure-2 to Misc. case No. 784/07) and the order dated 21.12.05 (Annexure -6 to the second writ petition) and they are upheld. Consequently, the impugne d communication dated 31.04.07 (Annexure-6) to the first writ petition is set as ide and quashed and it is hereby directed that the petitioner in the first writ petition should be given the charge of the Principal of the school and he will c ontinue to hold such charge till such time the post is filled up as per the recr uitment rules.

20. In view of the above, the first writ petition being W.P.(C) No. 2262/02 is allowed and the second writ petition being W.P.(C) No. 968/06 is dismissed. T here shall be no order as to costs.